

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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|--------------------|------------------------------------|
| JOHN W. AUSTIN, | § |
| | § No. 705, 2011 |
| Defendant Below, | § |
| Appellant, | § |
| v. | § Court Below—Superior Court |
| | § of the State of Delaware, in and |
| | § for New Castle County |
| STATE OF DELAWARE, | § Cr. ID No. 1102020008 |
| | § |
| Plaintiff Below, | § |
| Appellee. | § |

Submitted: May 17, 2012

Decided: May 30, 2012

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

ORDER

This 30th day of May 2012, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, John W. Austin, was found guilty by a Superior Court jury of Robbery in the First Degree and Possession of a Deadly Weapon During the Commission of a Felony. On the robbery conviction, he was sentenced to 15 years of Level V incarceration, to be suspended after 5 years for decreasing levels of supervision. On the weapon conviction, he was sentenced to 3 years at Level V. This is Austin's direct appeal.

(2) Austin's counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal; and (b) the Court must conduct its own review of the record in order to determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹

(3) Austin's counsel asserts that, based upon a careful and complete examination of the record and the law, there are no arguably appealable issues. By letter, Austin's counsel informed Austin of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Austin also was informed of his right to supplement his attorney's presentation. Austin responded with a brief that raises several issues for this Court's consideration. The State has responded to the position taken by Austin's counsel as well as the issues raised by Austin and has moved to affirm the Superior Court's judgment.

¹ *Person v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

(4) Austin raises several issues for this Court's consideration, which may fairly be summarized as follows. He claims first that his trial counsel provided ineffective assistance by failing to (a) contact certain witnesses; (b) adequately cross-examine the victim regarding her identification of him as the robber; (c) adequately cross-examine the police officers; (d) utilize the relevant phone records; (e) adequately cross-examine a witness who identified him from a videotape; and (f) obtain videotape evidence from a store he claims to have visited at the time of the robbery. Austin also claims that the witness who identified him from the videotape was not credible.

(5) Austin's first claim is that his trial attorney provided ineffective assistance of counsel. It is well-settled that this Court does not entertain claims of ineffective assistance of counsel that are raised for the first time on direct appeal.² Absent a full adjudication of any such claim by the Superior Court, there is no adequate record for this Court to review.³ Because Austin's claim of ineffective assistance of counsel was not raised below, we decline to address it for the first time in this proceeding.

(6) Austin's second claim is that the witness who identified him from the videotape was not credible. This Court will not substitute its judgment

² *Collins v. State*, 420 A.2d 170, 177 (Del. 1980).

³ *Wright v. State*, 513 A.2d 1310, 1315 (Del. 1986).

for that of the jury on issues of witness credibility.⁴ It is the sole province of the jury to determine witness credibility, resolve any conflicts in the testimony and draw any inferences from the proven facts.⁵ We, therefore, conclude that Austin's second claim is without merit.

(7) This Court has carefully reviewed the record and concluded that Austin's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Austin's counsel has made a conscientious effort to examine the record and the law and has properly determined that Austin could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

⁴ *Poon v. State*, 880 A.2d 236, 238 (Del. 2005).

⁵ *Chao v. State*, 604 A.2d 1351, 1363 (Del. 1992) (overruled on other grounds by *Williams v. State*, 818 A.2d 906 (Del. 2002)).